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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

COLUMBIA CALIFORNIA VALLEY INDUSTRIAL, LLC, Plaintiff and Respondent, v. GOLT TRADING GROUP, INC., et al., Defendants and Appellants.	B233487 (Los Angeles County Super. Ct. No. BC420599)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kevin C. Brazile, Judge. Affirmed.

Law Offices of Steve Luan and Steve Luan for Defendants and Appellants.

Sacha V. Emanuel for Plaintiff and Respondent.

* * * * * * *

Appellants seek relief from a default judgment, principally arguing that they did not receive service of the summons and complaint. We affirm.

FACTS AND PROCEDURE

On August 26, 2009, respondent Columbia California Valley Industrial, LLC filed a complaint alleging a single cause of action for breach of written lease agreement. Respondent named as defendants Golt Trading Group, Inc. (Golt), GTC House Depot, Inc. (GTC), and Ni Chunp Hu aka Li Chun Hu (Hu) "as shareholder of GTC" (collectively appellants).[1]

Two proofs of service signed by Ian Thomson indicated that GTC and Golt were served by personally serving Ms. Smith at 163 Bowery Street, 2nd Floor, New York, NY 10022. The proofs of service indicated that Ms. Smith was authorized to accept service. A third proof of service stated that Hu "as shareholder of GTC" was served at 157 Bowery Street, 2nd Floor, New York, NY 10022, by personally serving "Erica Chien, person in charge." Thomson also signed that proof of service and an affidavit of reasonable diligence showing that the summons and complaint were mailed to Hu as shareholder of GTC.

On May 20, 2010, the court entered a default judgment in the amount of $475,767 in favor of respondent and against Golt, GTC, and Hu "as shareholder of GTC."

On March 25, 2011, appellants filed a motion to set aside the default judgment. The motion was based on Code of Civil Procedure section 473, subdivision (b) (section 473(b)). In their motion, appellants acknowledged that (1) Golt entered a lease; (2) Golt's office is located at 157 Bowery Street, New York, NY 10022;[2] Hu was served

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[1] Chong Ying Chen "as shareholder of GTC" was also named as a defendant, but is not a party to this appeal.

[2] The New York Department of State identifies 157 Bowery Street as the address for Hu and Golt.

with a New York lawsuit in August 2010.[3] In January 2011, Hu's New York attorney informed Hu that a default judgment had been entered in California. Hu averred that in November 2007, a fire completely destroyed his office and shop at 157 Bowery Street and since then he has not worked at that address. Hu further stated that he did not know Erica Chien or Ms. Smith, and no service was effectuated on him through either Chien or Smith. Additionally, Hu averred that he was in China at the time Chien and Smith were allegedly served.

The court denied appellants' motion to set aside the default, concluding that appellants were not entitled to discretionary relief under section 473(b) because appellants did not file their motion for relief within six months of the default judgment. Although appellants did not argue it, the court also found that the default judgment could not be set aside on the grounds that it was void. The court found Hu's declaration insufficient to establish that service was not effectuated.

DISCUSSION

1. Service of Process

Whether a default judgment is void due to failure to effectuate valid service of process is a question of law subject to de novo review. (*Trackman v. Kenney* (2010) 187 Cal.App.4th 175, 182.) Any conflict between the principle that the trial court's determination is presumed correct and the principle favoring a trial on the merits should be resolved in favor of a trial on the merits. (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 703.) A court's denial of a motion to vacate a default judgment is reviewed for an abuse of discretion. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981.)

"Courts generally refer to jurisdiction over the parties and subject matter in any action as 'fundamental jurisdiction,' and whe[n] this is lacking there is an entire absence of power to hear or determine the case. [Citation.] Under such circumstances, 'an

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[3] In his declaration, Hu states that he was served in August 2011, but that date appears to be a mistake because it would mean Hu consulted an attorney in New York prior to service of the New York lawsuit. In his motion, Hu states that he was served with the summons of the New York action in August 2010.

ensuing judgment is void, and "thus vulnerable to direct or collateral attack *at any time*."' [Citation.]" (*County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1225 (*Gorham*).) "'[A] judgment is void for lack of jurisdiction of the person where there is no proper service on or appearance by a party to the proceedings.' [Citation.] Knowledge by a defendant of an action will not satisfy the requirement of adequate service of a summons and complaint." (*Id.* at p. 1226.) A judgment lacking personal jurisdiction is a violation of due process. (*Id.* at p. 1227.)

Appellants do not argue that respondent failed to meet the statutory requirements for serving out-of-state defendants. Instead, they challenge the information in the proofs of service. We focus on appellants' specific challenges.

A. Golt and GTC

With respect to GTC, the record indicates that GTC was served on August 31, 2009, by personally serving Ms. Smith at 163 Bowery Street, 2nd Floor, New York, NY 10022. The proof of service indicates that Ms. Smith is a Chinese female authorized to accept service. Similarly, with respect to Golt, the record indicates that on August 31, 2009, Golt was served by personally serving Ms. Smith at the same address and that Ms. Smith was authorized to accept service on behalf of Golt.

Appellants argue that the proofs of service must be false because Hu has "never known a Ms. Smith who is Chinese." Hu stated that "[s]ince I did[n't] and don't [know] a Chinese Ms. Smith, I was unable to accept any service from her." Appellants' evidence does not contradict the proof of service indicating that Ms. Smith was authorized to accept service on behalf of GTC and Golt. No *evidence* supports Hu's assumption that because he does not know Ms. Smith, she is unauthorized to act on behalf of GTC or Golt.[4] Notably absent from the declaration is any statement that Smith was not employed

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[4] In their reply brief, appellants' argue that the authorized agent for service of process was Hu "at the address of 13668 Valley Blvd. #d-2, City of Industry, CA 91746." (Boldface and italics omitted.) This is the address of the lease at issue in the case, which apparently was abandoned.

by GTC or Golt, or that she was unauthorized to accept mail for GTC or Golt. (See *Cruz v. Fagor America, Inc*. (2007) 146 Cal.App.4th 488, 498 [declaration insufficient to contradict the authorization to receive service when it fails to state that person was not authorized to accept mail].)

B. Hu "as Shareholder of GTC"

With respect to Hu, a proof of service signed by Ian Thomson indicated that Hu "as shareholder of GTC" was served through Erica Chien at 157 Bowery Street. An affidavit of reasonable diligence indicated that documents were mailed to Hu "as shareholder of GTC."

Appellants argue that the proof of service must be false because in "2007, a fire destroyed [his] office and shop located at 157 Bowery Street completely. Since then, I [(Hu)] ha[s] never worked or resided at [that address]." Appellants also argue that Hu has "never known an Erica Chien so that I [(Hu)] was unable to be served through her for substitute service[]." Finally, Hu claims to have been in China at the time Chien was served.

Whether Hu was in China at the time Erica Chien was served is irrelevant because it does not contradict the affidavit of service that Chien was served. The fact that Hu does not know Chien also does not show that Chien was unauthorized to accept service and no other evidence in the record indicates that Chien was not authorized to accept service. Hu's statement that his shop and office were burned in a fire in 2007 does not reveal their status in 2009 – the only relevant time. Indeed, in his declaration, Hu acknowledged that the address for Golt was "157 Bowery Street." Additionally, appellants do not dispute the affidavit indicating that Hu "as shareholder of GTC" was served by mail. Therefore, he does not show the judgment against him as shareholder of GTC was void for failure to effect service.

Hu's reliance on *Gorham*, *supra*, 186 Cal.App.4th 1215 and *American Express Centurion Bank v. Zara* (2011) 199 Cal.App.4th 383 is misplaced. In *Gorham*, there was evidence that the process server willfully filed a false proof of service because it stated that the defendant was personally served at a residence in San Diego at a time when the

defendant was incarcerated. (*Gorham, supra*, at pp. 1221, 1230.) Similarly, in *American Express*, the proof of service indicated that the defendant had been personally served and described the defendant as an Asian male with black hair, which was not consistent with the defendant's actual ethnicity or hair color. (*American Express, supra*, at pp. 387-388.) In contrast here, none of the statements in Hu's declaration show that the statements in Thomson's proof of service were false.

2. Appellants' Remaining Arguments Lack Merit

Appellants are not entitled to relief under section 473(b) because they did not file their motion within six months of the default judgment.[5] (*Rappleyea v. Campbell*, *supra*, 8 Cal.4th at p. 980 [relief under § 473 is unavailable more than six months after entry of default]; *Manson, Iver & York v. Black* (2009) 176 Cal.App.4th 36, 42 [same].)

Code of Civil Procedure section 473.5, which governs a motion to set aside a default for lack of actual notice in time to defend a lawsuit, does not assist appellants because they have not complied with the requirements of that statute. A motion for relief

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[5] Section 473(b) provides: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken. . . . No affidavit or declaration of merits shall be required of the moving party. Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. . . ."

Section 473(b) was the only basis identified in appellants' motion to set aside the default. Appellants' arguments based on section 473.5 and the court's equitable powers are therefore technically forfeited. (*Carpenter & Zuckerman, LLP v. Cohen* (2011) 195 Cal.App.4th 373, 384, fn. 6.)

under section 473.5, subdivision (b) must be "accompanied by an affidavit showing under oath that the party's lack of actual notice in time to defend the action was not caused by his or her avoidance of service or inexcusable neglect." Appellants provided no such affidavit.

Finally, appellants rely on the doctrine of equitable relief. Generally, a party seeking equitable relief from a default judgment must show (1) a meritorious case, (2) a satisfactory excuse for not presenting a defense such as extrinsic fraud or mistake, and (3) diligence in seeking to set aside the judgment once the fraud is discovered. (See *Rappleyea v. Campbell*, *supra*, 8 Cal.4th at p. 982; *Cruz v. Fagor America, Inc*., *supra*, 146 Cal.App.4th at p. 503; *Aldrich v. San Fernando Valley Lumber Co*. (1985) 170 Cal.App.3d 725, 738.) Appellants do not show they have a meritorious case. They argue that GTC and Hu were not parties to the lease but entirely ignore the alter ego allegations in the complaint as well as the fact that Hu was sued only as a shareholder of GTC. Appellants fail to show that service on them was ineffective and offer no other reason for not presenting a defense. Evidence that they did not receive a summons and complaint, even if true, does not show they lacked actual notice of the lawsuit, and appellants provide no *evidence* that they lacked actual notice. (See *Cruz v. Fagor America, Inc.*, *supra*, at p. 504 [statement that defendant did not receive summons and complaint does not show defendant was unable to defend against action because of lack of notice of the lawsuit].) Appellants do not claim to have been diligent in seeking to set aside the judgment and Hu's declaration indicated that he was served with a New York enforcement action in August 2010 but did not file the motion for relief from default until March 25, 2011.

DISPOSITION

The default judgment is affirmed. All parties shall bear their own costs on appeal.

FLIER, J.

We concur:

BIGELOW, P. J. GRIMES, J.